STATE OF MICHIGAN

COURT OF APPEALS

HEATHER MARIE JACKSON,

Plaintiff-Appellee,

v

CHARLEVOIX COUNTY ROAD COMMISSION,

Defendant-Appellant,

and

LIONEL ORLA MCCLANAGHAN,

Defendant.

UNPUBLISHED
January 25, 2005

No. 248338
Charlevoix Circuit Court
LC No. 02-130819-NI

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for summary disposition. We affirm.

This case arose out of a motor vehicle accident that occurred as plaintiff was driving eastbound on Boyne City-East Jordan Road in Charlevoix County. Defendant McClanaghan was driving a truck that was pulling an empty trailer westbound on the same road. McClanaghan was employed by defendant road commission (hereinafter "defendant") and was driving the truck, which was owned by defendant, in the course of his employment. As McClanaghan drove around a curve in the road, he encountered a truck that was being driven by Laverne Beebe. The truck was stopped while Beebe waited for oncoming traffic to clear so he could turn left onto Pearsall Road. According to the data from the on-board data recorder in McClanaghan's truck, eighteen seconds before the accident defendant was driving sixty miles per hour in a fifty-five mile per hour speed zone. The roads were wet because it had been raining that day. McClanaghan braked, which caused the trailer to fishtail, cross over the centerline into oncoming traffic, and strike plaintiff's vehicle. Plaintiff sued, and defendant moved for summary disposition. Plaintiff also moved for partial summary disposition. The trial court denied the parties' motions for summary disposition.

Defendant first argues that the trial court erred in finding a genuine issue of material fact regarding whether the accident was caused by defendant's truck traveling at an excessive rate of

speed because the only evidence offered by plaintiff on the issue of speed was the opinion testimony of two lay witnesses, whose testimony was not competent under MRE 701. We disagree.

Defendant contends that the only evidence to support plaintiff's claim that the truck driver's excessive speed caused the accident was the testimony of Laverne Beebe and Ruth Ann Wilson. In fact, Beebe's and Wilson's testimony was not the only evidence plaintiff offered regarding the speed at which McClanaghan was driving at the time of the accident. As noted, the truck being driven by McClanaghan was equipped with an on-board data recorder, and plaintiff attached to his motion a copy of the data from this recorder, which indicated that just eighteen seconds preceding the accident, McClanaghan was driving sixty miles per hour in a fifty-five miles per hour speed zone. Furthermore, McClanaghan conceded in his deposition that "if the data says 60, apparently I was running 60." In addition, plaintiff's accident reconstruction expert testified that the on-board data recorder indicated that in the minute preceding the accident, McClanaghan was driving sixty miles per hour at various times. Therefore, contrary to defendant's argument on appeal, even without Beebe's and Wilson's testimony, there was competent evidence that McClanaghan was speeding at the time of the accident.

Additionally, Beebe's and Wilson's testimony was not improper lay witness opinion testimony. Under MRE 701, opinion testimony by lay witnesses must be "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Defendant is correct that evidence that is inadmissible does not create a genuine issue of material fact. See *McCallum v Dep't of Corrections,* 197 Mich App 589, 603; 496 NW2d 361 (1992). However, Beebe's and Wilson's testimony was admissible under MRE 701 because both witnesses' testimony was "rationally based" on their perceptions and was helpful in assessing the factual issue of the truck's speed. Both witnesses observed defendant's truck in the moments before the accident, and both believed that the truck was speeding. *Mitchell v Steward Oldford & Sons, Inc,* 163 Mich App 622, 629-630; 415 NW2d 224 (1987) (opinion testimony of a lay witness regarding the speed of a vehicle is admissible). Making an observation about whether a vehicle is speeding is not particularly dependent on scientific, technical, or other specialized knowledge. MRE 702; *Mitchell,* supra at 630. In general, a person with experience driving can make conclusions about whether a vehicle is speeding by observing that vehicle in motion. Moreover, Beebe's and Wilson's testimony that defendant's truck was speeding was corroborated by the on-board data recorder. Accordingly, the trial court did not err in relying on lay opinion testimony to find that there was evidence that McClanaghan negligently operated the truck by driving slightly above the speed limit on a curve on a wet highway.

Defendant next contends that if plaintiff had argued that defendant negligently maintained the truck's brakes, defendant would be shielded from liability by governmental immunity because such a claim would not come within the motor vehicle exception. Generally, to preserve an issue for appellate review, the issue must be raised before and decided by the trial court. *Fast Air, Inc v Knight,* 235 Mich App 541, 549; 599 NW2d 489 (1999). Plaintiff did not raise the issue whether defendant negligently maintained the truck's brakes before the trial court, and the trial court did not decide whether a claim that defendant had negligently maintained the truck's brakes would fall within the motor vehicle exception to governmental immunity. Therefore, defendant's argument is not preserved for this Court's review. Faulty brake

maintenance is one theory of negligence that plaintiff could have alleged in her negligence claim against defendant. However, plaintiff did not proceed on such a theory. "Appellate courts do not issue abstract opinions of purely academic interest or reach out to anticipate and decide controversies which may arise in future litigation." *People v Turner*, 123 Mich App 600, 604; 332 NW2d 626 (1983). We will not decide this issue based on a hypothetical claim created by defendant, but not advanced by plaintiff.

Defendant finally argues that plaintiff's claim against defendant is barred by governmental immunity because the trailer, not the truck, struck plaintiff's vehicle, and the trailer was not a "motor vehicle" under MCL 691.1405 because it was not "motor-driven." Determining whether a vehicle is a "motor vehicle" within the scope of the motor vehicle exception to governmental immunity is an issue of statutory construction subject to de novo review on appeal. *Stanton v Battle Creek*, 466 Mich 611, 614-615; 647 NW2d 508 (2002). Summary disposition under MCR 2.116(C)(7) is appropriate "when a claim is barred because of immunity granted by law." *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 583; 640 NW2d 321 (2001).

The governmental tort liability act, MCL 691.1407 *et seq*., "provides immunity from tort liability to governmental agencies engaged in a governmental function." *Stanton, supra* at 614-615 (footnotes omitted). The immunity conferred upon governmental agencies is broad, but is subject to five narrowly construed exceptions. Id. at 615. One exception to the general rule of governmental immunity is the motor vehicle exception, which provides:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . . [MCL 691.1405.]

In *Stanton*, our Supreme Court defined a "motor vehicle," as used in MCL 691.1405, as "'an automobile, truck, bus, *or similar* motor-driven conveyance.'" *Id.* at 618 (emphasis in original), quoting *Random House Webster's College Dictionary* (2001).

Defendant is correct that a trailer is not a "motor vehicle" per se under the narrow definition of "motor vehicle" announced in *Stanton.* However, to be subject to the motor vehicle exception of the governmental immunity act for negligent operation of a motor vehicle, this Court has held that "the vehicle must be a motor-driven conveyance similar to an automobile, truck, or bus, and the alleged injuries must be caused by activities that are directly associated with the driving of the motor vehicle." *Regan v Washtenaw Co Bd of Co Rd Comm'rs (On Remand)*, 257 Mich App 39, 46; 667 NW2d 57 (2003), citing *Chandler v Muskegon Co*, 467 Mich 315; 652 NW2d 224 (2002), and *Stanton, supra*. In this case, while the trailer is not a motor vehicle, it was physically attached to defendant's truck that McClanaghan was driving. And the truck is clearly within the narrow definition of a motor vehicle as announced in *Stanton*. Furthermore, plaintiff's injuries were allegedly caused by the manner in which McClanaghan was driving the motor vehicle. Specifically, plaintiff alleged that McClanaghan was exceeding the speed limit and driving too fast for the wet road conditions; therefore, when McClanaghan applied the truck's brakes, the trailer being pulled by the truck crossed the centerline and collided with plaintiff's vehicle.

"[T]he language used by the Legislature in MCL 691.1405 indicates a desire and purpose, in part, to make roadways as safe for travel as possible by creating liability for governmental vehicles that are operated negligently and that create a danger for citizens as they use those same roadways." *Regan, supra* at 48-49. This purpose would be undermined by a ruling that the motor vehicle exception does not apply in this case because the trailer itself is not a "motor vehicle" under MCL 691.1405. Here, it was the operation of a motor vehicle, the truck, which allegedly caused the trailer that was attached to the truck to cross the centerline and collide with plaintiff's vehicle. Therefore, we find that plaintiff's alleged injuries were caused by an activity that was directly associated with McClanaghan's driving of the motor vehicle. *Regan, supra* at 46, 49. Under these circumstances, the trial court properly denied defendant's motion for summary disposition based on governmental immunity.

We reject plaintiff's request to award her actual and punitive damages under MCR 7.216(C)(1) because there is no evidence that the appeal, though without merit, "was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was a meritorious issue to be determined on appeal" as required by the court rule.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra